Finally, in the trial court, on March 17, 1971, Petitioners' counsel—met with the contention that the statute (Sec. 21-27 of Chap. 24, Ill. Rev. Stat.) required that specific facts be verified as a matter of personal knowledge—in turn argued:

> . . . (I)f it is construed in that way . . . then, as construed and applied in this case, that statute (Section 21-27), not only on its face but as construed and applied, violates the due process, the equal protection, the privileges and immunities and the democratic form of government provisions in the Federal Constitution . . .
>
> To avoid that very serious constitutional question, this court should construe this statute so that it is fair. And the only way that this can be made a fair statute, given this very extreme requirement of a five-day limitation on the time in which the petitions can be filed, is to say that a candidate can allege things on information and belief . . . and that the candidate is free to be honest and to state as estimates things which are, in the nature of things, estimates . . . (Appendix C).

Two days later, Petitioners filed memoranda (Appendix D), paragraph 3 of which asserted:

> If the governing statutes were to be construed as to require dismissal of [the] Complaint for failure to state a claim upon which relief can be granted, then each of such statutes (specifically, Ch. 24, 21-27, and Ch. 46, §§ 7-63 and 23-20) is unconstitutional, both on its face and as construed and applied in this case, because it violates: (a) The due process, equal protection, and privileges and immunities clauses of the United States Constitution . . .

The constitutional issues were raised in the trial court and again in the Appellate Court. Both courts ruled on them. Petitioners are entitled to raise those issues here.

CONCLUSION

Respondents' Brief in Opposition begins with a misreading of the Petition and a distortion of the record. Thereafter it does no more than elaborate its own misconceptions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

RICHARD F. WATT
HOWARD EGLIT
RICHARD GUTMAN
MELVIN L. WULF
BURT NEUBORNE
Attorneys for Petitioners

Richard F. Watt
Suite 4750 — One IBM Plaza
Chicago, Illinois 60611

Howard Eglit
American Civil Liberties Union
5 South Wabash Avenue
Chicago, Illinois 60603

Richard Gutman
Roger Baldwin Foundation
5 South Wabash Avenue
Chicago, Illinois 60603

Melvin L. Wulf
Burt Neuborne
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York

APPENDIX A

No. 56750

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

AUGUSTUS A. SAVAGE,

Plaintiff-Appellant,

vs.

WILSON FROST, and STANLEY T. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellees.

Appeal from the Circuit Court of Cook County, County Division.

Honorable HARRY G. COMERFORD, *Judge Presiding.*

BRIEF OF DEFENDANTS-APPELLEES

HOWARD M. MILLER
308 City Hall
Chicago, Illinois 60602
Attorneys for Defendants-Appellees constituting the Chicago Board of Election Commissioners

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
ANDREW M. RAUCCI
110 So. Dearborn Street
Chicago, Illinois 60603
Attorneys for Defendant Appellee Wilson Frost

Oral Argument Requested

. . . precinct, the judges of election certify "that the above and foregoing" results are true and correct. These judges of election are officers of the Circuit Court of Cook County, and are sworn to the performance of their duties. Ill. Rev. Stats. (1969), Ch. 46, §14-5, 14-7. Certainly, a defeated candidate should not be allowed to overcome the certified and sworn actions of officers of the court and force a recount solely on the ground that he "estimates" that the official count and canvas are not correct. See *Mac Guidwin* v. *South Park Comrs.*, 333 Ill. at 71.

II.

PLAINTIFF-APPELLANT WAS NOT DEPRIVED OF ANY CONSTITUTIONAL RIGHTS.

Citation of abstract dicta notwithstanding, there is nothing in the record to indicate that the decision of the Circuit Court violated any federal or state constitutional rights of plaintiff-appellant. He was obligated to file a verified complaint "sufficient in law" in order to secure a recount. He failed so to do. Thus the Circuit Court of Cook County took the only action that it could take properly. As the statute directed, it dismissed the complaint.

Interestingly, Savage never sought leave to amend his "complaint" to correct the deficiencies which were brought to his attention. Even more significant, he cites no authority even suggesting that the statutory requirement is unconstitutional. Thus we have the anomalous situation of a defeated candidate who claims a constitutional right to a "fishing expedition," though he was unwilling to allege, under oath, that it would affect the officially proclaimed result of the election. We respectfully submit that there is no authority for any such contention.

APPENDIX B

IN THE
SUPREME COURT OF ILLINOIS

AUGUSTUS A. SAVAGE, *Petitioner.* vs. WILSON FROST, and STANLEY J. KUSPER, JR., FRANCIS P. CANARY AND MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting THE CHICAGO BOARD OF ELECTION COMMISSIONERS, *Respondents.*	Petition for Leave to Appeal from the Appellate Court First District. There Heard on Appeal from the Circuit Court of Cook County, County Division. Honorable JOSEPH J. DRUCKER, *Judge Presiding.*

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

RICHARD F. WATT
COTTON, WATT, JONES,
KING and BOWLUS
105 W. Adams
Chicago, Illinois 60603

HOWARD EGLIT
American Civil Liberties Union
6 South Clark
Chicago, Illinois 60603

IN THE

SUPREME COURT OF ILLINOIS

AUGUSTUS A. SAVAGE, *Plaintiff-Appellant-Petitioner,* v. WILSON FROST, *et al.*, *Defendants-Appellees-Respondents.*	Appeal From The Appellate Court Of Illinois, First District.

PETITION FOR APPEAL AS A MATTER OF RIGHT OR, IN THE ALTERNATIVE, FOR LEAVE TO APPEAL

1. Plaintiff-Appellant appeals the judgment of the Appellate Court for the First District in this case. In the alternative, he petitions this Court for leave to appeal from that judgment.

2. The judgment of the Appellate Court was entered on October 12, 1973. No petition for rehearing was filed.

3. The points relied upon for reversal are:

(a) By denying a recount, the Appellate Court denied plaintiff all remedy and all meaningful opportunity to be heard on his charges that he was unconstitutionally defrauded of his election victory. It thus violated the due process and equal protection provisions of the Fourteenth Amendment and the due process and free and equal elections provisions of the Illinois Constitution of 1870 (Art. II, §§2, and 18) and 1970 (Art. I, §2 and Art. III, §3).

(b) As construed and applied by the Appellate Court, Ch. 24, §21-27, Ill. Rev. Stat. 1969 violates the above

constitutional provisions because it operates to deny plaintiff all remedy and all meaningful opportunity to be heard on his charges that he was unconstitutionally defrauded of his election victory.

(c) The Appellate Court erroneously concluded that the complaint failed to state a cause of action under the above statute.

4. The relevant facts, issues, and legal arguments are concisely presented in the attached brief which was filed in this Court by plaintiff-appellant when he attempted a direct appeal from the judgment of the trial court. Subsequently, this Court transferred the case to the Appeliate Court which, in due course, entered the judgment now sought to be reviewed.

5. For the reasons set forth at pages 8-10 of the attached brief, the constitutional issues are now ripe and were wrongly decided below. In addition, the construction of the election contest statute by the Court below flatly and unavoidably conflicts with the holding of the Appellate Court for the Fifth District in *Whitsell* v. *Rutherford,* 118 Ill. App. 2d 401, 405 (1969) (Eberspacher, Moran, and Goldenhersh, JJ.) See the discussion at pages 10-11 of the attached brief.

The Court below criticized the assertions in the complaint that plaintiff "estimated" the total number of votes which a recount would disclose that he had obtained. But that was merely honest pleading. *Of course* plaintiff could do no more than estimate the results of a recount which has not yet taken place: No honest plaintiff will ever be able to plead more than that.

The court below also relied on the form of the complaint's verification, pointing out that key allegations were

sworn to on "information and belief". Once again, this is simply an attack on honest pleading: *of course,* a candid and honest plaintiff must so qualify his allegations about ballots which he has never seen and cannot get access to.

The ultimate point is clear and simple: The decision below, for all practical purposes, has eliminated the recount as a viable procedure for ascertaining whether an election has been stolen by means of a false count in the polling place. It does this by requiring the plaintiff either to lie about his knowledge of the facts (thus avoiding the use of terms such as "estimate" and "information and belief") or, in the alternative, to see his complaint dismissed because he has failed to plead a cause of action.

Respectfully submitted,

Richard F. Watt
Cotton, Watt, Jones, King and Bowlus
105 W. Adams
Chicago, Illinois 60603

Howard Eglit
American Civil Liberties Union
6 So. Clark
Chicago, Illinois 60603
Attorneys for Plaintiff-Appellant-Petitioner

APPENDIX C

State of Illinois)
) ss
County of Cook)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DIVISION

AUGUSTUS A. SAVAGE, *Plaintiff;* v. WILSON FROST and STANLEY J. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting The Chicago Board of Election Commissioners, *Defendants.*	No. 71 Co. 0282

and

PHILIP G. SMITH, *Plaintiff;* v. BENNETT M. STEWART and STANLEY J. KUSPER, JR., FRANCIS P. CANARY and MARIE H. SUTHERS, individually and (in the case of the latter three) as together constituting The Chicago Board of Election Commissioners, *Defendants.*	No. 71 Co. 0283

Transcript of Proceedings in the hearing of the above entitled cause before the Honorable Harry G. Comerford, one of the judges of said court, on Wednesday, the 17th day of March, A. D. 1971, at the hour of 10:30 o'clock A.M.

APPEARANCES:

MR. DONALD PAGE MOORE
and
MR. THOMAS N. TODD,
appeared on behalf of the plaintiffs;

MESSRS. MC COY, MING & BLACK,
by MR. WILLIAM R. MING, JR.
and
MR. ALDUS S. MITCHELL,
appeared on behalf of the defendants Wilson Frost and Bennett M. Stewart;

MESSRS. WASHINGTON, KENNON, BRYANT & HUNTER, by MR. HOWARD M. MILLER,
appeared on behalf of the defendants Stanley J. Kusper, Jr., Francis P. Canary, and Marie H. Suthers, individually and as together constituting The Chicago Board of Election Commissioners.

. . . that Mr. Ming urges for the reasons I have outlined there.

Secondly, if it is construed in that way, the way that Mr. Ming urges, then, as construed and applied in this case, that statute, not only on its face but as construed and applied, violates the due process, the equal protection, the privileges and immunities and the democratic form of government provisions in the Federal Constitution and their analogues in the provisions of the Illinois State Constitution. Because it is fundamentally unfair to say to a plaintiff that "you must comply with the requirements", as Mr. Ming has urged that the statute says.

To avoid that very serious constitutional question, this court should construe this statute so that it is fair. And the only way that this can be made a fair statute, given this very extreme requirement of a five-day limitation on the time in which the petitions can be filed, is to say that a candidate can allege this on information and belief, and that is a proper verification, and that the candidate is free to be honest and to state as estimates things which are, in the nature . . .

APPENDIX D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT-COUNTY DIVISION

AUGUSTUS A. SAVAGE,
Plaintiff,
v.
WILSON FROST, et al.,
Defendants.
No. 71 Co. 282

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION TO DISMISS THE COMPLAINT

Plaintiff adopts and reiterates the contentions and legal theories asserted by his attorneys during the oral argument in this case on March 17, 1971. This memorandum is presented merely as a supplement to that argument by plaintiff's attorney.

1. The clear, unqualified allegations of Paragraphs 7 and 8 of the Complaint fully meet the statutory requirements governing the pleading of an election contest case. *Whitsell* v. *Rutherford,* 118 Ill. App.2d 401, 405, 255 N.E. 2d 34, 36 (5th Dist. 1969); *Accord, Easdale* v. *Sparta Community School Dist.,* 29 Ill.2d 554, 194 N.E.2d 306 (1963); *Joyce* v. *Blankenship,* 399 Ill. 136, 77 N.E. 2d 325 (1948).

2. Verification of some of the facts on plaintiff's information and belief is authorized by law. *Dial* v. *Welker,* 332 Ill. 509, 163 N.E. 772 (1928).

3. If the governing statutes were to be so construed as to require dismissal of plaintiff's Complaint for failure to state a claim upon which relief can be granted, then each of such statutes (specifically, Ch. 24, §21-27, and Ch.

46, §§ 7-63 and 23-20) is unconstitutional, both on its face and as construed and applied in this case, because it violates:

(a) The due process, equal protection, and privileges and immunities clauses of the United States Constitution, and

(b) The provisions of Art. II, §§ 2, 18 and 19 of the Illinois Constitution of 1870, and

(c) The provisions of Art. II, §§ 2 and 12, and Art. III, §§ 3 and 4 of the Illinois Constitution of 1970.

Respectfully submitted,
/s/ Donald Page Moore
One of Plaintiff's Attorneys.

Pope, Ballard, Kennedy,
Shepard & Fowle
69 West Washington Street
Chicago, Illinois 60602
312:346-0900

PROOF OF SERVICE

I caused copies of the above memorandum to be served upon the following:

William R. Ming, Esq.
123 West Madison Street
Chicago, Illinois
Hon. Howard Miller
Chicago Board of Election
Commissioners
City Hall
Chicago, Illinois

by delivery to their respective offices on March 19, 1971.

/s/ Donald Page Moore
Donald Page Moore